

From: Borre Winckel [<mailto:Borre@biasandiego.org>]

Sent: Monday, January 06, 2014 12:12 PM

To: Kevin Crawford

Cc: Don Neu; Kathy Dodson; Debbie Fountain; Jane Mobaldi; David de Cordova; Gary Barberio; Celia Brewer; Matt Adams; Mike McSweeney

Subject: BIA PROTEST: Case Name:. MCA 13-02, Previously Known As Resolution No. 2013-003; Affordable Housing Impact Fee – January 9, 2014, Hearing by the Carlsbad Housing Commission.

Importance: High

Date: January 6, 2014

City of Carlsbad Housing Commission
c/o Kevin Crawford, Interim City Manager
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008

CC: Mayor & City Council, City Attorney, City Clerk

Re: SECOND BIA PROTEST: Case Name:. MCA 13-02, Previously Known As Resolution No. 2013-003; Affordable Housing Impact Fee – January 9, 2014, Hearing by the Carlsbad Housing Commission.

Dear Mr. Crawford:

The Building Industry Association of San Diego County (hereafter “BIA”) received notice from your Housing Commission on January 2, 2014. The notice informs us that the Commission intends to revisit adoption of an unprecedented and extraordinary high affordable housing impact fee (hereafter the “fee”) when it next convenes on January 9, 2014. This proposed action comes after the item was pulled from the Commission’s September 19, 2013 Agenda, which in turn was based on our letter to City Manager John Coates dd. September 16, 2013. BIA acknowledges two matters. First, that Mike McSweeney and the undersigned met with City and Commission Staff on December 17, 2013 and second that the legal environment supporting our position was further affirmed when the Governor vetoed AB 1229 (Toni Atkins). We thank Staff for meeting with us on the critical topic of alternative approaches to affordable housing production, and for the invitation to explore such in greater detail. However, while we much welcome this opportunity, that same day we were also informed that the subject fee would nevertheless come before the Commission in January of 2014. Given the recent Holiday Season, we have not even had the chance to convene any meeting designed to provide Carlsbad with alternative strategies to affordable housing production.

We suggest that the City take no action until CALIFORNIA BUILDING INDUSTRY ASSOCIATION v. CITY OF SAN JOSE (AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY) Case: S212072, is decided by the Supreme Court of California. This case will likely be decided this year and squarely deals with the essence of our protest here, in that the

industry asserts that your fee consultant, Keyser Marston, routinely promulgates flawed nexus findings based in turn on flawed fee analysis methodologies to warrant the new impact fee.

Please be advised and informed that the BIA opposes and shall vigorously challenge the proposed adoption of any Resolution intended to establish an affordable housing fee on market-rate rental housing production. The proposed fee on new rental housing is flat out illegal. Among other reasons, it violates the Costa-Hawkins Rental Housing Act. In-lieu-type fees were squarely addressed by the court of appeal in Palmer/Sixth Street v. City of Los Angeles (2009) 175 Cal.App.4th 1396. There, the court struck down fees intended to mitigate the impacts of market rate rental housing on the need for new affordable housing stock, just as Carlsbad now proposes: Because the affordable housing requirements conflict with and are inimical to the Costa-Hawkins Act, it necessarily follows that the in lieu fee provision, which exists only within the context of the preempted affordable housing requirements, is also preempted by the Act.

BIA does not limit its opposition to the Costa Hawkins Act. We vigorously oppose the Fee Study by the Commission's consultant Keyser Marston of September, 2013, which purports to justify the proposed Fee. BIA rejects the argument that a new house or apartment unit built causes the need for a new (affordable) housing. There simply is no "essential nexus" between the construction of new housing and the need for affordable housing. Keyser Marston must have prepared the Carlsbad Nexus Study prior to the recent US Supreme Court ruling in Koontz v. St. Johns River Water Management District, as it makes no attempt to satisfy the basic constitutional requirements set forth in that decision. The US Supreme Court confirmed that a heightened nexus (cause and effect) standard must exist between the "project" and the alleged impact it causes. Furthermore, a measure of proportionality must be established between the project's impact and the remedy imposed to address the impact. For years, the courts required a mere associational relationship between the project, the impact and the fee. The Keyser Marston study, while elaborate in its findings, fails to satisfy the essential nexus/rough proportionality requirement which is now the law of the land. At a minimum, the study must be revised to address the requirements enunciated by the US Supreme Court.

The BIA has great familiarity with Keyser Marston. We find it of great interest that at the same time that Carlsbad is considering a \$20 per s.f. fee for rental units, San Marcos was provided with a Study that limited this Fee to approx. \$10,700 per unit held for sale, while the City of San Diego is apparently at \$8.25 per s.f. and Oceanside at \$1.75 per s.f. In other words, Keyser Marston provides its clients with the fee the client wants and deems "right sized" for the market. While it can be argued that some of the aforesaid cities have a different housing market, such differences are not that great to yield such wildly different study outcomes. You should be aware that the BIA is part of the Jobs Coalition which is opposing the City of San Diego's "Workforce Housing Offset Fee". The Coalition has funded a signature drive which is designed to overturn that city's December, 2013, action which is to enact a Keyser Marston-based fee on non-residential land uses.

Passage of California Proposition 26 in 2011 shall also constitute a major challenge for the City to adopt this new tax on housing. The City has not obtained a 2/3 voter majority from its citizenry for what amounts to nothing more than a regulatory fee. The proposed fee is not and

cannot be couched as a Development Impact Fee under the Mitigation Fee Act (Gov. Code Section 66000 et seq.). Under Prop 26 this Fee is a tax unless the City can prove – as it is required - that it is not a tax by showing that it fits within one of seven specific exceptions that would allow certain defined types of fees / charges. We already know that this proposal shall fail each of these seven required exceptions.

We will attend the January 9, 2014, Hearing and voice our protest there as well. We would much prefer to devote our time to creating real solutions to building affordable housing rather than fight over a fee which does nothing more than massively and adversely impact the cost of apartment construction. It is a simple fact that enactment of this proposal shall hurt the housing options for Carlsbad's workforce!

Sincerely,



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